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ATTORNEY FOR APPELLANT:

TAFFANEE L. KEYS
Marion County Public Defender
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

KELLY A. MIKLOS
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

LASHAWNA WITHERSPOON,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 49A02-0512-CR-1148

APPEAL FROM THE MARION SUPERIOR COURT

The Honorable Clark Rogers, Judge

Cause No. 49G16-0409-FD-166640

September 12, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

LaShawna Witherspoon (“Witherspoon”) appeals from her conviction of criminal mischief as a class D felony.

We affirm.

ISSUE

Whether the trial court erred in granting the State’s motion to amend the information.

FACTS

During the early morning hours of September 15, 2004, Officer Daryl Jones of the Marion County Sheriff’s Department responded to a domestic disturbance call regarding an alleged battery at the Candletree Apartments. Officer Jones was given a description of two vehicles that might have been involved in the reported incident. He proceeded to the apartment complex to provide back up to a fellow officer who had already arrived at the scene. As he approached the scene, Officer Jones observed a vehicle matching the description provided by dispatch and driven by Witherspoon. The vehicle exited the apartment complex and proceeded northbound on Candletree Drive. Officer Jones followed. Witherspoon turned onto 47th Street, traveling westbound, and Officer Jones noticed the vehicle accelerating. Witherspoon stopped at Georgetown Road, turned northbound on Georgetown, and accelerated again.

When Officer Jones was within “approximately three to four cars lengths” of Witherspoon’s vehicle around 56th Street, he activated the sirens on his “fully marked” police vehicle, attempting to stop Witherspoon. (Tr. 8). Witherspoon did not stop and accelerated “in excess of seventy miles an hour” in a forty mile per hour zone. (Tr. 9).

Officer Jones continued the pursuit with sirens and lights still activated. At approximately 60th and 61st Streets, Witherspoon “attempted to make a high speed turn into” the Oakbrook apartment complex but lost control, sliding “off the road” and “over the top of a wooden railroad tie,” knocking down a steel and aluminum lamp post with four large plastic globes. (Tr. 9). Officer Jones immediately stopped his vehicle and drew his weapon. Witherspoon “jump[ed] out of the vehicle” and stated “that she was sorry [for] running.” Id. Officer Jones then arrested Witherspoon. The Oakbrook Apartments paid approximately \$2,999.00 to replace the light pole and to restore consistency to the complex’s entrance area, but did not report the cost for repairs to the prosecutor’s office until June 25, 2005.

On September 17, 2004, the State charged Witherspoon with the following crimes: (1) residential entry, as a class D felony; (2) resisting law enforcement, as a class D felony; (3) domestic battery, as a class A misdemeanor; (4) battery, as a class A misdemeanor, (5) criminal conversion, as a class A misdemeanor; and (6) criminal mischief, a class B misdemeanor.¹ The trial court set the omnibus date for November 17, 2004. On January 25, 2005, Witherspoon waived trial by jury. On June 29, 2005, the State moved to amend the charging information by enhancing the criminal mischief offense to a class D felony, based upon documentation of the costs of the repairs provided by Candletree Apartments on June 25, 2005. After a hearing, the trial court granted the State’s motion to amend on July 12, 2005. A bench trial commenced on August 31, 2005, and Witherspoon was found guilty on both charges.

¹ On August 31, 2005, the State filed a motion to dismiss all charges except for the offenses of resisting law enforcement, as a class D felony, and criminal mischief, as a class D felony.

DECISION

Witherspoon alleges that the trial court abused its discretion in granting the State's motion to amend the charging information approximately seven months after the omnibus date. Specifically, she contends that the amendment was one of substance because it changed the prosecution's theory of the case and the possible penalties. As a result, Witherspoon claims that the amendment thereby prejudiced her substantial rights and was untimely filed in violation of Indiana law. We disagree.

"In criminal prosecutions, the charging information exists to guarantee the accused certain protections" and apprise the defendant of "the nature of the accusation" so that "preparations for mounting a defense can be made." Jones v. State, 766 N.E.2d 1258, 1262 (Ind. Ct. App. 2002) (citing Tripp v. State, 729 N.E.2d 1061, 1064 (Ind. Ct. App. 2000)). It also provides a basis for a double jeopardy defense in the event of further prosecution. Id. Thus, emphasis is placed on safeguarding the accused from being disadvantaged by an unannounced charge rendering him or her unprepared to go to trial.

However, the State may amend the charging information on motion at any time due to any immaterial defect, including "the failure to state an amount of value or price of any matter where that value or price is not the essence of the offense." See IND. CODE § 35-34-1-5(a)(8). The court may also at any time before, during, or after the trial, permit the State to amend the charges in respect to form as long as it does not prejudice the substantial rights of the defendant. See I.C. § 35-34-1-5(c). These rights include the right to adequate notice and the opportunity to be heard and contest the amendment. See Tripp v. State, 729 N.E.2d 1061, 1064 (Ind. Ct. App. 1999), and I.C. § 35-34-1-5(d). If

the amendment is granted, the court shall, upon motion by the defendant, order any continuance of the proceedings, allowing the defendant ample opportunity to prepare a defense. See I.C. § 35-34-1-5(d).

When the amendment involves a felony, “the information may be amended in matters of substance or form” upon giving written notice to the defendant any time up to thirty days before the omnibus date. See I.C. § 35-34-1-5(b). An amendment is one of form if a defense under the original information would be available after the amendment and the defendant’s evidence would apply equally to the information in either form. Jones, 766 N.E.2d at 1262. “An amendment is one of substance if it is essential to the making of a valid charge of the crime.” Id.

In the original information, Witherspoon was charged with the offense of criminal mischief as a class B misdemeanor when she: (1) without the consent of Oakbrook Apartments, (2) recklessly or knowingly, (3) damaged their property by running into a lamp post with her vehicle. This offense, without a stated value of the pecuniary loss, is a class B misdemeanor under Indiana Code Section 35-43-1-2(2). The amended information charged Witherspoon with criminal mischief as a class D felony; which said offense is defined as the recklessly, knowingly, or intentionally damaging of property of another “if the pecuniary loss is at least two thousand five hundred dollars.” I.C. § 35-43-1-2 (2)(a)(B). According to the record, at the time of the incident, the total cost of the damages Witherspoon caused was not known. Therefore, the State had filed a valid charge with the evidence it had at the time. After receiving additional documentation

evidence from Candletree Apartments on June 25, 2005, the State was able to quantify the cost of the damages to be in excess of two thousand five hundred dollars.

First, we find that the amendment to the information was an immaterial defect. The State was unable to state the specific amount of the value of the pecuniary loss to Oakbrook Apartments when Witherspoon was originally charged right after the incident on September 15, 2004. However, the value of the loss is not “the essence of the offense,” but rather whether the loss itself that was caused by Witherspoon’s reckless or knowing conduct. See I.C. § 35-34-1-5(a)(8). Witherspoon had been reasonably apprised of the nature of the charge and the potential loss when she received the probable cause affidavit and the original charging information. Therefore, pursuant to Indiana Code Section 35-34-1-5(a)(8), the trial court did not err when it permitted the State to amend the information to more accurately reflect the amount of pecuniary loss.

Second, we find that the amendment was one of form and not of substance. As aforementioned, Witherspoon was put on reasonable notice that the damages she caused to the lamp post (knocking down a steel and aluminum lamp post with four large plastic globes) would be of considerable value with the possibility of damages far exceeding two hundred fifty dollars, the amount for a class B misdemeanor. The State had originally charged Witherspoon with a valid offense and the amendment only enhanced the potential penalty for the offense as a consequence of the actual cost of the loss being ascertained. Thus, the amendment was not essential to the validity of the original charge; it merely conformed the charging information to the evidence to be presented. See Jones, 766 N.E.2d at 1262 (citing Haak, 695 N.E.2d 944, 951-52 (Ind. 1998)). The availability

of Witherspoon's defense and applicability of the evidence under the original information was unaffected by the amendment. See Brown, 728 N.E.2d 876, 880 (Ind. 2000). Pursuant to Indiana Code Section 35-34-1-5(c), the trial court properly granted the State's motion to amend the charging information.

Third, we find that the amendment was permissible after the omnibus date because Witherspoon did not demonstrate how her substantial rights were prejudiced inasmuch as she was given notice of the amendment and an opportunity to challenge it. The State filed its motion to amend approximately one month before trial. The trial court conducted a hearing on the amendment within a few days of its filing. Witherspoon vigorously challenged the motion at the hearing. Upon granting the motion, the trial court continued the trial date to August 31, 2005, to enable Witherspoon to prepare for trial. During this interim period, documentation that supported the State's allegation and responses to Witherspoon's interrogatories were supplied to her on June 29, 2005. At trial, Witherspoon presented expert witness testimony and evidence to rebut the cost of the damages alleged by the State.

Because the amendment to the information merely clarified the accurate and reasonable cost of the damages caused, there was no unfair surprise. As stated, due to the extent and nature of the incident, Witherspoon had been reasonably apprised of the possibility that the cost to repair the damages she caused could be significantly more than two hundred fifty dollars. Moreover, Witherspoon had ample time and opportunity to be heard and prepare her defense. Furthermore, Witherspoon's substantial rights were not prejudiced because she was given ample notice, and an opportunity to challenge the

amendment, and to prepare her defense in rebuttal of the State's evidence regarding the value of the pecuniary loss. Neither the theory of the case nor identity of the offense was altered as a result of the amendment to the charging information. The trial court did not err in granting the State leave to amend the charging information.

Affirmed.

RILEY, J., and VAIDIK, J., concur.